

The Children's Amendment Bill 2019 and ECD

1. SUMMARY

- Chapters 5 and 6 (partial care and ECD programmes) of the Children's Amendment Bill 2019 are largely unchanged from the previous version of the Bill (October 2018). Feedback from the consultation has not been taken on board even and there are a number of drafting errors.
- The Bill does not include amendments to create a more inclusive and enabling regulatory framework for ECD, which is not only an urgent priority for the sector but also a government commitment.
- The Bill includes a number of regressive amendments relating to ECD:
 - The peremptory duty to prioritise and fund partial care and ECD programmes in poor communities is changed to a discretionary power.
 - A new prohibition on funding infrastructure on private property for partial care is introduced.
 - 'Registration with conditions' is made a new prerequisite for assistance (financial and non-financial) for partial care facilities, effectively narrowing what was a broad and enabling 'power to assist clause'.
 - Significant confusion has been introduced around conditional registration. The role and purpose of conditional registration versus registration with conditions has become muddled and does not speak to DSD's work on the Conditional Registration Framework.
- No amendments have been introduced to give effect to the decision to migrate ECD to DBE, despite the SONA pledge that this would be achieved over the next year. Therefore, all ECD-related duties and powers in Chapters 5 and 6 remain with DSD.
- **It is our view that the problems with the Bill are too fundamental to be remedied during its parliamentary passage, and the Bill should therefore be reconsidered.**

2. HARMONISATION OF REGISTRATION AND FUNDING

- A joint position paper was signed by 42 organisations calling on the government to use the review of the Children's Act to create an inclusive and enabling regulatory framework for ECD programmes (see Appendix A).
- The ANC have since issued their 2019 Manifesto, which includes commitments to a) promote home and community-based ECD models, and b) standardise guidelines and norms and standards for ECD. Both of these commitments require consequential amendments to the Act, which are missing from this Bill.

3. PRIORITISING FUNDING IN POOR COMMUNITIES

- The government is proposing to remove the duty on provincial DSDs to prioritise the funding of partial care and ECD programmes in poor communities. The proposed amendments to sections 78(4) and 93(4) turn the obligation to prioritise provision in poor communities into a discretionary power. This works against the pro-poor developmental imperative of the Constitution and the government, and will also undermine progress towards universal access to ECD.
- Arguably, this amendment is legally impermissible because:
 - It is a regressive amendment enacted without public policy justification, and therefore will likely be unconstitutional. When the state takes away existing rights they are under an obligation to provide reasons that ought to be scrutinised at a higher threshold.
 - There can be no conceivable justification for such an amendment, rendering the proposed amendment irrational and unlawful.
 - Section 7(2) of the Constitution obligates the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’ This includes the right to equality and to basic education. This amendment does the opposite and moves us further away from achieving substantive equality.
 - The rights to education and the rights of the child are some of the most significant rights in the Constitution. Both section 28, entitled “Children”, and section 29, entitled “education” of the Constitution are “immediately realisable” rights. This means that a state’s capacity and resources must be adjusted to meet the identified need.
 - It is anti-developmental. Any law, policy or development plan must prioritise the most marginalised and place considerable weight to the best interests of children (*Government of RSA and Others v Grootboom and Others* [2000]).
 - The state must legislate in a manner that ensures the safety and protection of children. As children in poor communities are more likely to attend facilities that are unsafe, it is incumbent on PDSs to prioritise funding in these communities.
 - The state must legislate in a manner that ensures the dignity of the child. For true dignity and equality to be achieved, a child’s early development and learning are vital.

4. PROHIBITION ON FUNDING INFRASTRUCTURE IN PRIVATE HOMES OR PROPERTIES NOT OWNED BY A NON-PROFIT ORGANISATION

- The 2014 DSD Audit suggests that among *unregistered* ECD centres about 40% are run from formally built private homes, with a further 15% run from ‘informally built shacks/huts’ many of which will double up as private homes. About one-third of

conditionally registered ECD centres are run from these types of premises. Unregistered and conditionally registered ECD centres are more likely to be attended by poor children. They are also most likely to be in need of infrastructure investment in order to support them towards full registration. This amendment could therefore mean that many poor children are excluded from funding that would help to ensure that they are cared for in safe and healthy environments.

- Arguably, such exclusions will be constitutionally impermissible for the following reasons:
 - Any policy or law that excludes the majority of poor children from funding that helps to ensure their safety and wellbeing cannot be rational or reasonable.
 - Any law, policy or development plan must prioritise the most marginalised and place considerable weight to the best interests of children (*Government of RSA and Others v Grootboom and Others* [2000]).
 - The state must legislate in a manner that ensures the safety and protection of children. As many children attend ECD programmes in private facilities, it is incumbent upon the government to ensure that these facilities are safe.
 - The state must legislate in a manner that ensures the dignity of the child and promotes equality. The state may not therefore legislate in a way that has the potential to further marginalise the most vulnerable, by impeding their access to safe, quality ECD.
 - The state must legislate in a manner that considers the child’s “precise real-life situation” (*S v M* [2007] ZACC 18 para 24).

5. POWER TO ASSIST

- Recognising the gross inequality levels in South Africa, the Children’s Act provides for expansive powers that are progressive and pro-poor, including the ‘power to assist’ clauses in sections 82(5) and 97(5). These are broad powers that were considered necessary to assist partial care facilities and ECD programmes to comply with the applicable Norms and Standards.
- While the assistance power in section 82(5) is likely often to be used to support conditionally registered facilities to achieve full compliance, PDSs should also have the discretion to support facilities that have not yet received conditional registration where there is no risk to the safety and wellbeing of children (i.e. where the PDS does not have to close down the facility under Section 84).
- The government’s amendment as proposed is likely to undermine the ability of PDSs to support and scale up ECD provision in poor communities and as such, is regressive. The government has deleted the comparable amendment to Section 97 (proposed in the July 2018 draft Bill) and should remove this amendment too.

6. CONDITIONAL REGISTRATION

- The proposed amendments to sections 83 and 98 further conflate two different things and will continue to work against the progressive use of conditional registration in the regulatory system. The following types of registration must be kept distinct:
 - Full registration with no areas of non-compliance but conditions attached (e.g. pertaining to the size or hours of the programme). This is ‘registration with conditions’ and not conditional registration. Programmes that have this type of registration receive full registration and do not have to make changes within a certain time-frame, because the conditions relate to the ongoing parameters of operation not to unmet quality standards.
 - Conditional registration is given where there are areas of non-compliance with the norms and standards and other registration requirements, and therefore certain changes must be made within a specified time-frame.
- The current Children’s Act also does not make this distinction clear. The government’s proposed amendments, however, further conflates these issues and potentially leave a legislative vacuum in terms of the second type of registration – conditional registration. Given DSD’s extensive work around the Conditional Registration Framework, it is likely that this is unintended.
- The Bill should include:
 - a clear definition of conditional registration;
 - a power for the minister to prescribe how conditional registration is used, including minimum standards.

7. MIGRATION OF ECD TO DBE

- The government has committed to transferring responsibilities for ECD to DBE. The latest information seems to suggest that overall leadership for ECD and specific responsibility for the Grade RR year will move to DBE. However, this is not accommodated for in the Bill. Consequential amendments to the Children’s Act will be required as currently all responsibilities relating to ECD registration and funding (including Grade RR) sit with DSD, at both national and provincial levels.
- The legal framework to support this migration still needs careful consideration. Amendments to Chapters 5 and 6 of the Children’s Act should only be tabled in Parliament once this process has been consulted on and agreed, to avoid another Children’s Amendment Bill being brought forward in quick succession.

8. RIGHT TO ECD

- SmartStart proposed an amendment that would make explicit a child’s right to ECD. The amendment is in line with the National Integrated Early Childhood Development Policy, the government’s commitment to universal access to ECD, the Constitution and international law (specifically the UN Convention on the Rights of the Child (UNCRC), to which South Africa is a signatory).
- Section 29 of the Constitution holds that “everyone has the right to basic education”. As education outcomes are known to depend on exposure to stimulation from the earliest age, this right logically includes a child’s right to education in the early years. This is further bolstered by section 28 of the Constitution which requires that we must adopt an interpretation that promotes the “best interests” of the child.
- Further, under international law, the right to education under the UNCRC has been confirmed to include early learning. Other clauses in the UNCRC (such as Articles 5, 6 and 31) are also understood to combine to create a right to early childhood development. (See General Comment No.7 on the UNCRC).

Appendix: Joint Position Paper Rethinking the Children’s Act for Early Childhood Development

This position paper is endorsed by the following 42 organisations, which work in early childhood development across South Africa:

- Bulungula Incubator
- Centre for Creative Education
- Centre for Early Childhood Development (CECD)
- Children’s Institute
- Cotlands
- Do More Foundation
- Early Inspiration
- Early Learning Resource Unit (ELRU)
- Environment and Language Education Trust
- Family Literacy Project
- Foundation for Community Work
- GolangKulani
- Grassroots
- Ikamva Labantu Charitable Trust
- Ilifa Labantwana
- Innovation Edge
- ITEC (Institute of Training and Education for Capacity-building)
- Ithemba Projects
- JAM South Africa
- Khululeka Community Development
- Knysna Education Trust
- Lesedi Educare Association
- LETCEE (Little Elephant Training Centre for Early Education)
- Midlands Community College
- Motheo Training Institute Trust
- National Early childhood Development Alliance (NECDA)
- Natal Early Learning Resource Unit
- Nelson Mandela Foundation
- NECTA (Network of Early Childhood Training Agencies)
- Ntataise Trust
- Persona Doll Training
- Safe and Sound Learning Association
- Saide
- Sikhula Sonke
- Singakwenza
- SmartStart
- South African Federation of Waldorf Schools
- South African Montessori Association
- TREE (Training and Resources in Early Education)
- Tshikululu Social Investments
- Ubunye Foundation
- Wordworks

Summary

The government's goal is to achieve universal access to early childhood development (ECD) by 2030. However, the current regulatory framework is unnecessarily complex and onerous and results in many ECD programmes being excluded from registration and funding.

The Buffalo City Declaration committed the government to, 'A comprehensive review and harmonisation of policy and legislation within the ECD sector moving towards universal access' and to 'Streamlining of registration processes'.

The government's National Integrated Early Childhood Development Policy prioritises mixed modes of delivery, recognising that diverse ECD provisioning is needed to reflect the different ages and broader contexts of children, and, importantly, that public financing mechanisms must be accessible for non-centre based ECD programmes.

The current review of the Children's Act presents an important opportunity to fulfil these commitments and to create the inclusive and enabling regulatory framework that is urgently needed. Without this, children living in poor communities will continue to miss out on the early learning and development opportunities that they need and deserve.

What is the problem?

✘ The Act creates a dual registration process for ECD centres.

✘ The Act takes a 'one size fits all' approach and does not differentiate between different ECD modalities.

✘ Registration requirements in the regulations and norms and standards are too onerous.



Many children cannot access ECD provision or can only access programmes caught in a cycle of no funding and low quality.

What is the solution?

✔ Deal with ECD provision under one chapter, enabling a one-step registration process for all ECD programmes.

✔ Define different ECD modalities and distinguish between them in registration requirements.

✔ Focus on basic minimum standards for registration, and incentivise best practice through a new quality assurance regime.



Every child has access to quality early learning and development opportunities.

How the Children's Act creates barriers to registration and funding

- **The Act creates a dual registration process.**

ECD settings with more than six children must be registered as partial care. They must deliver an ECD programme as defined in the Act, which must be registered as well. So an ECD programme provided out of a partial care facility is subject to two sets of legal processes, each with its own requirements and norms and standards, which creates unnecessary duplication and bureaucratic burden. One unintended consequence has been a focus on partial care registration at the expense of registering and funding other types of ECD programmes.

- **Neither the Act nor the regulations explicitly differentiate between different types of ECD programmes.**

The lack of differentiation between different ECD modalities results in a 'one size fits all' regulatory framework which does not speak to the realities of home-based ECD centres, as well as non-centre based programmes, such as childminders and playgroups.

- **Registration requirements in the Act's regulations and norms and standards are unnecessarily onerous.**

The nature of the premises and contexts of many ECD programmes, makes the infrastructure standards for registration (including the link to municipal requirements) inappropriate and unrealistic. These requirements also exclude programmes in informal housing areas. A government report found, *'There are presently too many norms and standards for social welfare services, particularly relating to children and older persons. Most of these norms and standards are relevant, but not feasible to attain [...]. The sector should select a few key important norms and standard and focus on those.'* (DPME, 2013)

- **Poor children miss out most.**

These barriers to registration and funding disproportionately impact on the types of programmes that are relied upon by vulnerable families for both childcare and access to early learning and development opportunities. These programmes are denied the opportunity to access the subsidies that would help them to improve their facilities and provision. Furthermore, unregistered ECD programmes are often allowed to keep running, but without proper oversight to ensure safety and quality.

How the Children's Act could be changed to create an enabling framework

- **The government should amend the Act to deal with ECD programmes in an integrated and holistic way under one Chapter, enabling a unified registration process.**

There are two main proposals:

- The Act's definition of ECD programme should be amended to cover place, provider and programme content.

- ECD programmes should be dealt with solely under Chapter 6 of the Children’s Act and removed from the scope of Chapter 5 (partial care).

These amendments would enable all elements of the regulatory framework (place, provider and provision) for ECD programmes, to be dealt with together, making possible a one-step registration process including an integrated set of norms and standards. This is the approach that was originally proposed by the South African Law Reform Commission, in their first draft of the Act. It would inject new clarity into the law, would help to improve compliance, and would result in significant cost savings for government.

- **The government should amend the Act to make certain types of ECD programme exempt from compulsory registration.**

In order to tackle the problem of regulatory over-reach and to ensure that resources and capacity are focused where they will bring most benefit to children, the Act’s regulations should set out limited exemptions from compulsory registration. These could include, ECD programmes with six or fewer children, and ECD programmes that are only attended by children for one or two hours a week. Exempt programmes could still voluntarily register in order to access funding. They would also still have to comply with other provisions in the Act – in particular, those relating to child protection.

- **The government should amend the Act to distinguish between different ECD modalities.**

Defining different categories of ECD programmes would assist appropriate differentiation within registration requirements and norms and standards. The categories should be defined in regulations (which means there would be further time to consult with the sector on definitions).

Four suggested categories are proposed for consideration, these are *ECD centres*, *home-based childcare*, *sessional ECD programmes* and *outreach ECD programmes*. A maximum group size for home-based childcare could be stipulated, with larger programmes that use dedicated structures on residential properties able to register as ECD centres. Sessional ECD programmes would include playgroups and mobile ECD programmes, which are attended for up to four hours a day and for no more than 16 hours a week. Outreach programmes would include home visiting and parent support groups.

- **The government should amend the Act to prescribe how conditional registration is used.**

Conditional registration is an important mechanism for bringing as many programmes as possible into the regulatory framework in a managed way. However, conditional registration is currently being interpreted and applied differently between provinces and, in some areas, is not being used at all. The Act should therefore be revised so that there is no longer provincial flexibility around criteria for conditional registration or the maximum period for conditional registration.

- The government should amend the Act, the regulations and the norms and standards to focus on *minimum standards* for health, safety and child outcomes, which speak to the contexts and realities of a wide range of ECD programmes.

It is important that the registration requirements and norms and standards are focused on basic minimum standards which ensure children’s wellbeing and positive developmental and learning outcomes. It is not appropriate to make best practice standards the entry-point for registration and funding. The effect of this has been to put registration out of reach of many ECD programmes. This works directly against the government’s central goal of achieving universal access to ECD programmes.

To guide the development of the new integrated norms and standards and to help determine whether an existing standard should be kept, deleted or changed, six principles are proposed:

- **Realistic:** The goal is to reduce rather than eliminate risk, which requires an assessment of the *likelihood* and *severity* of potential harm.
 - **Contextually appropriate:** Standards should reflect the realities of the contexts in which the programmes operate and the reasonable expectations of parents.
 - **Proportionate:** The need for minimum standards must be balanced against the potential gains (to children and parents) of attendance at an ECD programme.
 - **Objective:** Each standard must be amenable to consistent interpretation.
 - **Comprehensible:** Each requirement must be clear and meaningful.
 - **Observable:** Those responsible for monitoring and enforcement, must be able to observe compliance with a standard when they attend a programme.
- The government should amend the Act to create a new quality assurance system that enables best practice and continuous improvement to be dealt with separately to minimum standards.

A quality assurance system is the proper mechanism to promote and incentivise best practice in ECD. Creating a national statutory quality assurance regime would also introduce a new level of public accountability into ECD programme provisioning and provide a transparent measure for parents to understand and compare the quality of programmes, harnessing parents’ ‘purchase power’ in the drive to raise standards.

A national quality assurance regime would enable a move towards permanent ECD programme registration. The current requirement for ECD programmes to renew their registration creates a substantial bureaucratic burden for provinces and municipalities. By using a quality assurance regime to monitor ongoing compliance with norms and standards, as well as the attainment of higher standards, resources could be focused on improving quality rather than processing renewal paperwork.